In the Matter of Merchant Mariner's Document No. Z-210513-D6 and all other Licenses, Certificates and Documents
Issued to: MELVIN C. PERKINS

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

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MELVIN C. PERKINS

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations Sec. 137.11-1.

By order dated 13 April 1955, an Examiner of the United States Coast Guard at Baltimore, Maryland, revoked Merchant Mariner's Document No. Z-210513-D6 issued to Melvin C. Perkins upon finding him guilty of misconduct based upon four specifications and incompetence based upon one specification. The misconduct specifications allege in substance that while serving as an acting able seaman on board the American SS ORLAND LOOMIS under authority of the document above described, Appellant wrongfully failed to perform his duties as helmsman on or about 13 February 1952 and he deliberately discharged phlegm and mucus on the mess hall deck during mealtime on divers dates between 14 December 1951 and 20 February 1952; he indulged in other repulsive mannerisms between the latter two dates; he wrongfully failed to appear, on 28 February 1952, as directed by a duly issued and served subpoena; and while serving as a wiper on board the American SS TILLAMOOK under authority of his document, he wrongfully failed to perform his assigned duties while the ship was at sea on or about 11 August 1953. The incompetence specification alleges that Appellant was in February 1952, and still is, unfit by reason of his mental condition to perform duties on board merchant vessels of the United States as authorized by his Merchant Mariner's Document. The Examiner concluded that two other misconduct specifications were not proved.

On 4 April 1955 at Baltimore, Maryland, Appellant was served with the charges and specifications under consideration. The charge sheet ordered Appellant to appear at Baltimore, Maryland, for a hearing at 1000 on 12 April 1955.

The hearing was convened at the scheduled time and place on 12 April 1955. Since Appellant was not present, the Examiner recessed the hearing until 1400 in order to give Appellant an opportunity to put in an appearance. The hearing was reconvened at 1400.

Appellant had not appeared or contacted the Coast Guard. The Examiner noted Appellant's default and declared that the hearing would be conducted in absentia. This procedure was in accordance with 46 CFR 137.09-5(f).

The Investigating Officer who had served the charges and specifications on Appellant then verified this fact. The Investigating Officer states that service was made on Appellant, on 4 April 1955, after Appellant had filed an application for a duplicate Merchant Mariner's Document. The reverse side of the charge sheet contains the statement that Appellant was formally served on 4 April 1955. This statement was signed by the Investigating Officer and three other Coast Guard Officers as witnesses to the service.

In accordance with 46 CFR 137.09-35, the Examiner entered pleas of "not guilty," on behalf of Appellant, to the charges and each specification.

Thereupon, the Investigating Officer made his opening statement including particulars concerning the service of the charges and specifications upon Appellant. At the time of service, Appellant was given a full explanation of the nature of the proceedings, the rights to which he was entitled and the possible results of the hearing. Among other things, the Investigating Officer stated that he specifically advised Appellant of his right to be represented either by an attorney or nonprofessional counsel. The above referred to statement was placed upon the reverse side of the charge sheet form when Appellant refused to sign the acknowledgement of receipt on the reverse side of the form.

The Investigating Officer introduced in evidence several documentary exhibits and the testimony of Daniel H. Haines who was serving as deck maintenance man on the ORLAND LOOMIS during the voyage between 14 December 1951 and 20 February 1952. One of the exhibits is a petition protesting against Appellant because of his filthy and repulsive behavior on the latter voyage of the ORLAND LOOMIS. Haines identified this petition and his testimony supports the statements about Appellant which are contained in the petition. Haines testified that the idea for the petition originated at a weekly crew meeting since the unlicensed personnel objected to eating with Appellant because of his disgusting habits.

At the conclusion of the hearing, the Examiner announced his findings and concluded that the charges had been proved by proof of the above five specifications. He then entered the order revoking Appellant's Merchant Mariner's Document No. Z-210513-D6 and all other licenses, certificates and documents issued to this Appellant by the United States Coast Guard or its predecessor authority.

From that order, this appeal has been taken, and it is urged that:

1. Appellant was not legally given notice of the hearing. The hearing was improperly held in Baltimore instead of Norfolk where the voyage was completed. Since the hearing was not a fair one, the case should be remanded to permit Appellant to produce evidence. Appellant cannot be properly tried until he is mentally fit for sea duty.

2. The testimony of witness Haines is the only basis for finding that Appellant failed to perform his duties as helmsman on 13 February 1952.

3. The petition protesting against Appellant's behavior on the ORLAND LOOMIS, which was signed by twenty-three of Appellant's shipmates, including the Master, is not relevant and is of questionable efficacy since it is dated six days after the completion of the voyage on 20 February 1952. Haines was the only signer of the petition who testified at the hearing. His testimony included minute details concerning Appellant's behavior at a time more than three years earlier; but this was the result of leading questions and the fact that Haines was not cross-examined.

4. The specification alleging the discharge of mucus is almost self-convicting because of its repulsive nature. The repetitious reference to mucus would nauseate the stoutest judicial mind.

5. Appellant denies that he received service of a subpoena to appear on 28 February 1952. This incident is more than three years old and it should have been dropped by the Coast Guard.

6. Certified copies of entries in the rough deck logbook of the TILLAMMOK are the only evidence pertaining to Appellant's alleged failure to perform his duties on 11 August 1953. These entries indicate that Appellant was ill on 11 and 12 August 1953.

7. The charge of incompetence was not proven because the two U. S. Public Health Service documents do not state the facts upon which the conclusion is based that Appellant was not fit for sea duty.

8. Since 46 U.S.C. 239 is penal in character and must be strictly construed (Fredenberg v. Whitney (D.C. Wash., 1917), 240 Fed. 819), there should have been a proper hearing. Joyce

v. Bulger (D. C. Wash., 1916), 240 Fed. 817. There is no provision in the Administrative Procedure Act for hearings in absentia as provided for in 46 CFR 137.09-5(f).

9. A person of Appellant's low intelligence should have been represented by counsel since it is questionable whether Appellant realized the true gravity of the case.

10. For the above reasons, it is respectfully submitted that a prima facie case was not legally made out against Appellant.

APPEARANCES: J. Deems Barnard, Esquire, Legal Aid Bureau, Baltimore, Maryland, of Counsel.

Based upon my examination of the record submitted, I hereby make the following

FINDINGS OF FACT

On a foreign voyage between 14 December 1951 and 20 February 1952, Appellant was serving as an acting able seaman (until 13 February) on board the American SS ORLAND LOOMIS and acting under authority of his Merchant Mariner's Document No. Z-210513-D6. From 13 February until the end of the voyage, Appellant was serving as an ordinary seaman.

On 13 February 1952, Appellant was on the 1200 to 1600 watch while the ORLAND LOOMIS was at sea. At about 1310 on this date, Appellant had the helmsman watch during rough weather when he left the wheel unattended and sat on a stool in the wheelhouse. The ship had swung 35 degrees off her course before the Officer of the Watch realized what had happened. Appellant was relieved of the helmsman watch and demoted to ordinary seaman by the Master at this time.

On this voyage, Appellant was continually dirty both in person and clothing. Appellant habitually spat on the deck in the mess hall; he repeatedly spat on and blew mucus from his nose directly to the deck on more than one occasion. Due to these and other repulsive habits which Appellant did not stop upon request by the other members of the crew, the unlicensed personnel on the ship voted to exclude Appellant from the mess hall during mealtimes.

Also on the voyage, Appellant was obsessed with the belief that his shipmates were plotting against him without provocation; he made completely fictitious statements to various persons in authority; he was steering the ship more than 30 degrees off her course on numerous occasions; and Appellant caused an additional burden to be placed on his shipmates because it was found that he

could not be trusted to perform only the most simple tasks.

A petition dated 26 February 1952 and containing some of the above facts was signed by the Master of the ORLAND LOOMIS and twenty-two members of the crew on the voyage in question. This petition concluded by protesting against Appellant being permitted to continue his efforts to become a qualified merchant seaman and predicting that Appellant would cause continuous trouble for everyone with whom he came in contact as a merchant seaman. It was stated opinion of the signers of the petition that Appellant was "completely unfit, mentally and physically, to go to sea and live in the close contact with other men which such a life required."

At 1330 on February 1952, Appellant failed to appear at the Coast Guard office in Baltimore, Maryland, as he was commanded to do by a subpoena duly issued by the Coast Guard and served upon Appellant at Norfolk, Virginia, on 25 February 1952 at 1415. Appellant did not appear, as directed by this subpoena, at any subsequent time nor did he contact the Coast Guard to explain the reason for his noncompliance.

On 21 March 1952, Appellant was carefully examined by a medical doctor at the U. S. Public Health Service Hospital, Norfolk, Virginia. The doctor concluded that Appellant was not fit for sea duty for the following reasons: "Schizophrenic reaction, paranoid type."

OPINION

The above discussion of the service of the charges and specifications upon Appellant shows that he was given timely notice of the hearing, he was fully advised as to the nature of the charges and he was informed of his right to retain counsel in his defense. Since Appellant did not appear at the hearing, he has no right now to object on the grounds that he was not represented by counsel and did not realize the seriousness of the charges. The hearing was properly held at Baltimore because Appellant was served there and his home address is in that city. Appellant did not object to this location at the time he was served or at any time prior to taking this appeal. Hence, Appellant was given every opportunity to appear at the hearing and to submit evidence to disprove the charges and specifications. The fact that Appellant is not considered to be mentally fit for sea duty is not a declaration that Appellant is insane and should not have been directed to appear at a hearing until he was fit for sea duty. Under these circumstances, Appellant was afforded a fair hearing and there is no good reason why the case should be remanded to permit Appellant to produce evidence in the absence of any showing that Appellant has newly discovered evidence which was not

available to him at the time of the hearing.

With respect to Appellant's contention that 46 U.S.C. 239 must be strictly construed to afford Appellant a hearing in his presence because there is no provision in the latter statute or the Administrative Procedure Act for hearings in absentia, it is sufficient to state that Appellant was given every opportunity to attend the hearing but he chose to remain absent. Therefore, he has had his "day in court." While there is no specific provision in the statutes for a hearing in absentia, there is no prohibition against them; and it is considered that a liberal construction is permitted since R. S. 4450, as amended (46 U.S.C. 239), provides for remedial rather than penal proceedings. Whatever may have been the situation prior to 1936, the amendments to section 4450 of the Revised Statutes in that year eliminated the application of Fredenberg v. Whitney (D.C. Wash., 1917), 240 Fed. 819 to proceedings under 46 U.S.C. 239. It has been the constant interpretation of the Coast Guard that the latter statute is remedial in nature as well as in effect. In addition, it is believed that the regulation providing for hearings in absentia, after adequate notice to the person charged (46 CFR 137.09-5(f), is consistent with even a strict construction of the provisions of 46 U.S.C 239.

The specification, alleging that Appellant failed to perform his duties as helmsman on 13 February 1952, is supported by the petition of protest against Appellant and an entry in the Official Logbook of the ORLAND LOOMIS as well as by the testimony of witness Haines. This evidence constitutes the necessary substantial evidence to prove the specification.

The findings of fact pertaining to Appellant's conduct on the ORLAND LOOMIS are based upon the testimony of Haines and the petition signed by Appellant's shipmates. The two sources of evidence are mutually corroborative as to the revolting habits indulged in by Appellant and other characteristics which indicate Appellant's inability to serve as a member of a ship's crew. Haines was asked some leading questions but his testimony is substantially in accord with the above findings independent of his answers to leading questions. (Appellant forfeited his right to cross-examine Haines by voluntarily failing to appear at the hearing.) Although the evidentiary value of the petition may have been weakened somewhat by the fact that it was dated six days after the completion of the voyage, it is my opinion that it is sufficiently corroborated by the testimony of Haines to support the findings of fact pertaining to the specification alleging that Appellant behaved in a disgusting and offensive manner while serving on the ORLAND LOOMIS. The reason for the repetitious reference, in the record, to the discharge of mucus by Appellant

seems to be due to the numerous repetitions of this practice by Appellant. If the recitation of such facts is enough to "nauseate even the stoutest judicial mind," as urged by Appellant, the effect upon Appellant shipmates must have been considerably stronger, especially while they were eating their meals.

The contention that Appellant failed to receive the subpoena to appear on 28 February 1952 is completely without merit. A copy of the subpoena, together with Appellant's signature acknowledging its receipt on 25 February 1952, is contained in the record. There is no statute of limitations which runs against such an offense; and a seaman is guilty of misconduct if he refuses to respond to such a subpoena and answer questions short of incurring penal liability. 24 Op. Atty. Gen. (1902) 136.

The finding concerning the specifications alleging that Appellant wrongfully failed to perform his duties on the TILLAMOOK, on 11 August 1953, is reversed and the specification is dismissed. A logbook entry is the only evidence pertaining to this incident and the entry does not indicate that it was read to Appellant or that he was given an opportunity to reply to the alleged offense. Unless there has been adequate compliance with 46 U.S.C. 702, it is not considered that a prima facie case is made out.

I concur with the contention that the two U. S. Public Health Service documents do not make out a prima facie case of incompetence because they do not state the facts upon which it is concluded that Appellant is not fit for sea duty. In order to establish such a prima facie case, a medical report must contain the independent facts upon which the examining physician's conclusions or opinions are based, rather than simply stating the physician's bare conclusions or opinions. A medical doctor's expert opinion based upon his professional knowledge should ordinarily be given considerable weight in such cases; but the final determination as to whether a seaman is fit for sea duty should be made by the Examiner based upon all the pertinent facts.

Nevertheless, I agree with the conclusion of the Examiner that Appellant was in February 1952, and still is, unfit for duty on merchant vessels of the United States by reason of his mental condition. As stated by the Examiner, Appellant's mental unfitness for sea duty is clearly shown by his conduct while serving on the ORLAND LOOMIS and there is no evidence to indicate that there has been any change in Appellant's mental condition since that time. Appellant was guilty of not only irrational and filthy personal habits while living in close contact with the other seamen under the confined conditions which necessarily prevail on board ship but also of burdening his shipmates with the duties which he was unable to perform. It is apparent from the petition against Appellant

that his shipmates did not consider him to be fit for sea duty for these reasons. Although the proof of the charge of mental incompetence is based primarily upon the findings of fact as to Appellant's conduct on the ORLAND LOOMIS, this conclusion is corroborated by the opinion of Appellant's shipmates and the conclusion of the U. S. Public Health Service physician who examined Appellant a month after the completion of the voyage. It is immaterial to the proof of the specification whether Appellant was a paranoid schizophrenic as concluded by the U.S. Public Health Service physician.

For all of the above reasons, I conclude that a prima facie case was made out with respect to three of the misconduct specifications and the specification alleging mental incompetence. In view of the seriousness of these offenses, it would be grossly inconsistent with the statutory duty of the Coast Guard of promoting safety on United States merchant vessels to permit Appellant to continue to seek employment on these vessels. The order of revocation is the only appropriate remedial action under the circumstances.

ORDER

The order of the Examiner dated at Baltimore, Maryland, on 13 April 1955 is AFFIRMED.

A. C. Richmond
Vice Admiral, United States Coast Guard
Commandant

Dated at Washington, D. C., this 28th day of July, 1955.